IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RANDY DAVID McDONALD, Appellant.	No. 32857-7-II (consolidated with) No. 33460-7-II UNPUBLISHED OPINION

VAN DEREN, J. — Randy David McDonald appeals his conviction for unlawful possession of a controlled substance and bail jumping. He argues that his trial counsel provided ineffective assistance of counsel because he did not properly investigate whether McDonald was eligible for a drug offender sentencing alternative (DOSA) and did not ask the court to impose a DOSA sentence. In a statement of additional grounds for review (SAG),[1] McDonald argues that (1) the court miscalculated his offender score because it included two prior burglary convictions that "washed" in May 2003; and (2) the court applied an erroneous standard range for his bail jumping sentence. Finding no reversible error, we affirm.

FACTS

On April 3, 2004, Lewis County Sheriff's Deputy Anderson stopped McDonald for speeding. Upon learning that McDonald had a suspended license, third degree, Deputy

[1] McDonald also filed a Personal Restraint Petition (PRP) arguing that the trial court erred in calculating his offender score. We consolidated the PRP with the direct appeal.

Anderson placed McDonald under arrest. Deputy Anderson conducted a search incident to arrest and found a piece of tin foil containing a white powdery substance in McDonalds's pocket. The substance field tested positive for methamphetamine. Deputy Anderson also found a piece of a plastic straw and a brass smoking pipe, of the type commonly used to smoke marijuana. On the floor near the driver's seat, Deputy Anderson found a black box containing pieces of a scale.

On April, 15, 2004, the State arraigned McDonald and charged him by information with unlawful possession of a controlled substance and driving with a suspended license. The court ordered McDonald to appear for an omnibus hearing at 2:20 p.m. on May 13, 2004.

When McDonald failed to appear for the omnibus hearing, the State filed an amended information adding one count of bail jumping. The court issued a warrant for McDonald's arrest.

On May 20, 2004, McDonald appeared before the court to quash the warrant and he was also arraigned on the amended information. McDonald told the court that he did not appear for the omnibus hearing because he had written down the wrong date. The court quashed the arrest warrant and allowed McDonald to remain out of custody under the original terms of his release.

McDonald entered into a plea agreement with the State, where he agreed to plead guilty to unlawful possession of methamphetamine in exchange for the State dismissing the driving with a suspended license charge. The parties reserved the bail jumping charge for a bench trial. At the change of plea hearing, McDonald's attorney stated that based on McDonald's offender score of seven, if McDonald were convicted of both possession of methamphetamine and bail jumping, the standard range sentence was 33 to 43 months and that the State planned to recommend 33 months. Furthermore, if the court did not convict McDonald of bail jumping, his standard range

was 12 to 24 months and the State would recommend 12 months and one day. The sentence would also include 9 to 12 months of community custody.

The court found McDonald guilty of the bail jumping charge. It sentenced McDonald to 12 months and one day for the possession charge and to 33 months for the bail jumping charge to run concurrently. McDonald appeals.

ANALYSIS

I. DOSA

The DOSA program provided for in former RCW 9.94A.660 (2002) is meant to provide drug treatment to drug offenders who will benefit from it.[2] *State v. Grayson*, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005). The program allows trial courts the authority to sentence eligible non-violent offenders to a reduced sentence, treatment, and increased supervision. *Grayson*, 154 Wn.2d at 337. The treatment begins during incarceration. *Grayson*, 154 Wn.2d at 337-38. The

[2]Under former RCW 9.94A.660, to be eligible for a DOSA:

(1) An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);

(b) The offender has no current or prior convictions for a sex offense or violent offense in this state, another state, or the United States;

(c) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance; and

(d) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence.

offender serves one-half of his sentence in incarceration and one-half in the community. After release, the offender is closely monitored while on community supervision and undergoes treatment for the balance of the sentence. *Grayson*, 154 Wn.2d at 338. If the offender fails to comply with the terms of the DOSA while he is in the community, he is returned to prison to serve the remainder of the sentence. *Grayson*, 154 Wn.2d at 338.

The trial court's decision whether or not to grant a DOSA is generally not reviewable. *Grayson*, 154 Wn.2d at 338. But an offender may challenge the procedure under which his sentence was imposed. *Grayson*, 154 Wn.2d at 338. Here, McDonald is not challenging the trial court's failure to impose a DOSA, but rather, argues that his counsel was ineffective for not investigating whether a DOSA was appropriate and then failing to request it.

II. Ineffective Assistance of Counsel

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Stenson*, 132 Wn.2d 668, 705-06, 740 P.2d 1239 (1997). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Prejudice occurs when, but for counsel's deficient performance, the outcome would have differed. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption can be overcome where, for example, the attorney failed to

properly investigate, determine appropriate defenses, or properly prepare for trial. *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (quoting *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)). But to overcome the presumption, there must be a showing that counsel had no legitimate strategic or tactical rationale for his conduct. *McFarland*, 127 Wn.2d at 336.

To determine whether McDonald received ineffective assistance of counsel, we first determine whether the court would likely have found him eligible for a DOSA sentence.

Nothing in the record affirmatively indicates that McDonald was not eligible for a DOSA. He has no violent offense convictions or sex offense convictions and the record does not indicate that McDonald was subject to deportation. Further, his standard sentencing range for the bail jumping charge was greater than one year. But we do not know the quantity or value of the methamphetamine found in McDonald's pocket, *see* former RCW 9.94A.660(1)(c); the record does indicate that it was small enough to fit in a piece of tin foil inside McDonald's pocket. Thus, there is a strong possibility that McDonald would have likely been eligible for DOSA if the quantity of methamphetamine was only a "small quantity." Former RCW 9.94A.660(c).

We next turn to whether McDonald's attorney acted unreasonably when he failed to investigate or recommend a DOSA. *Stenson*, 132 Wn.2d at 705. Our Supreme Court has held, "[t]he law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. . ." *Pirtle*, 136 Wn.2d at 488 (quoting *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). We seek to prevent the defendant from using hindsight to second guess his trial attorney and effectively reverse his conviction. *In re the Pers. Restraint of Stenson*, 142 Wn.2d 710, 742-43, 16 P.3d 1 (2001) (citation omitted).

McDonald suggests that his attorney "should have obtained an evaluation in order to determine whether DOSA would be beneficial, and if so, counsel should have argued strenuously for DOSA rather than acceding to the [S]tate's recommendation for the bottom of the standard range." Br. of Appellant at 16. We know of no requirement for counsel to obtain a client evaluation before engaging in plea negotiations, nor does McDonald rely on such authority. Further, McDonald's attorney was aware of his client's extensive criminal history and was successful in negotiating the low-end of the sentencing range even though McDonald had such an extensive history.[3] McDonald's criminal history includes at least three felony drug convictions. Especially notable is his 2002 conviction for possession with intent to manufacture. He also has a 1998 second degree burglary conviction. Here, McDonald's counsel was confronted with the fourth felony drug conviction. Under these circumstances, when the State offered to recommend the low end of the standard range and to dismiss the driving with suspended license charge, McDonald's attorney pursued a reasonable trial tactic in not pursuing a DOSA and thereby

[3]McDonald's previous felony convictions included:

Crime	Date of Crime
Burglary	6/30/1974
Burglary	1/24/1977
VUCSA - Possession	1/23/1997
VUCSA - Possession	4/12/1998
Second Degree Burglary	5/8/1998
VUCSA - Intent to Manufacture	12/11/2002

McDonald also had non-felony convictions for: public disturbance in 1974; liquor violation in 1976; possession of marijuana in 1976; failure to comply in 1974; public disturbance in 1976; resisting arrest in 1976; disorderly conduct in 1976; driving with a suspended license in 1982; driving without a valid operator's license in 1988; driving without a valid operator's license in 1989; third degree theft in 1992; driving without a valid operator's license in 1994; driving with a suspended license, third degree in 1997; driving with a suspended license, third degree in 2000; possession of drug paraphernalia in 2001; and making a false statement in 2001.

running the risk that the State would withdraw its plea offer.

Furthermore, even though he was eligible for a DOSA, there is no indication that a DOSA evaluation would have indicated that McDonald was a good candidate for rehabilitation or that the State or the court would have endorsed such a sentence for McDonald had his counsel argued for it. *See, e.g., In Re Personal Restraint of McKay*, 127 Wn. App. 165, 170, 110 P.3d 856 (2005) ("DOSA sentences reduce drug and drug felony recidivism, and thus benefit rehabilitated individuals and society as a whole, through reduced crime and lower costs.") Based on McDonald's record, including an intent to manufacture conviction in 2002, he is unable to demonstrate that it was likely that the trial court would have imposed a DOSA. Thus, we find that McDonald cannot demonstrate prejudice based on his attorney's decision to not obtain a DOSA evaluation and argue for the imposition of such a sentence.

III. Plea Agreement

The State argues that McDonald violated the plea agreement when he appealed his conviction. It argues that McDonald received the benefit of his bargain with the State because the prosecutor dismissed the driving with a suspended license charge and agreed to recommend the low end of the sentence charge.

The statement of defendant on plea of guilty states: "The prosecuting attorney will make the following recommendation to the judge: If convicted of County III [bail jumping], 33 mos . . . Dismiss Count II [driving with a suspended license] on plea range of 33-43 mos." Clerk's Papers at 10. The agreement also stated that if the court imposed a sentence within the standard range, McDonald agreed not to appeal the sentence.

A plea agreement is essentially a contract between the defendant and the State and normal contract principles apply. *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). The parties' manifest intent controls our interpretation of the agreement. *Turley*, 149 Wn.2d at 400.

Here, the plea agreement states that McDonald will not appeal a guilty verdict or a standard range sentence. In effect, McDonald is appealing his standard range sentence and is therefore, breaching his plea agreement. Because McDonald received effective counsel, we find no basis to overturn his sentence and we enforce the agreement.

IV. Offender Score

McDonald argues that the court miscalculated his offender score because his 1974 and 1975 convictions should have washed out. Under RCW 9.94A.525(2), which governs offender scores, prior convictions are not counted in the offender score under the following:

> *Class A and sex prior felony convictions shall always be included in the offender score.* Class B prior felony convictions other than sex offenses shall not be included in the offender score, if *since the last date of release from confinement* (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, *the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction*. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. . . .

(Emphasis added).

Here, McDonald has not spent 10 years since 1974 without a criminal conviction. Thus, under RCW 9.94A.525(2) none of his felony convictions wash out for purposes of calculating his offender score. The trial court did not err in calculating McDonald's offender score at seven.

V. Sentencing Range

McDonald argues that the court erred in determining the standard range sentence for bail jumping because bail jumping is always one class lower than the original conviction.

RCW 9A.76.170(3) governs the class of bail jumping and states: "Bail jumping is: (c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony . . ."

Here, McDonald was convicted of possession of methamphetamine in violation of RCW 69.50.401(d), which is a Class C felony.[4] Thus, under RCW 9A.76.170(3)(c), McDonald's bail jumping conviction is a Class C felony and the court did not err in calculating the offender score.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

[4] RCW 69.50.401(b) states that possession of methamphetamine is a Class B felony. But the court found McDonald guilty under subsection (d), which is a Class C felony. In either case, the class of bail jumping is not affected because under RCW 9A.76.170(3)(c), if McDonald is convicted of either a Class B or Class C felony, the bail jumping conviction is a Class C.